Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona Corporation; KALISPELL FEED AND GRAIN, INC., an Arizona Corporation; JOHN W. MARTIN, individually; PATRICIA M. MARTIN, individually,

Petitioners,

vs.

NORWEST BANK KALISPELL, N.A., a National Banking Corporation, et al.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In reversing the district court's denial of Respondent's post-jury verdict motion for judgment as a matter of law, did the Ninth Circuit err in applying a standard of review that does not sufficiently recognize the Seventh Amendment's prohibition against federal courts reexamining facts tried and determined by a jury, and which is in conflict with the standard of review suggested by this Court's authorities, and that applied by other Circuits?

2. Did the Ninth Circuit deprive Petitioners of their Seventh Amendment right to jury trial by improperly reweighing evidence and ignoring evidence upon which the jury based its verdict, in reversing the district court's denial of Respondent's motion for judgment as a matter of law?

3. The Ninth Circuit in this case, pursuant to an increasing and pervasive practice, rendered its decision in an unpublished/not-to-be cited memorandum. In cases like this, in which a court of appeals reverses a district court's judgment entered on a jury verdict, are litigants entitled – based either on constitutional rights of due process and equal access to a fair and open judiciary, or as a matter of acceptable judicial procedure – to a written, published decision?

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

John W. Martin, Patricia M. Martin, John W. Martin Construction Company and Kalispell Feed and Grain, Inc.

* The caption includes the names of all parties who participated at trial and on appeal. Claims involving other parties in the district court were either dismissed or bifurcated before trial. There are no parent or subsidiary companies to be listed with Petitioners.

(referred to throughout as "Martins") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's unpublished Memorandum opinion is reprinted at page A-3. The Ninth Circuit's unpublished Order amending its memorandum disposition is reprinted at page A-1, and its unpublished Order denying rehearing and rejecting the suggestion for rehearing *en banc* is reprinted at page A-18.

The unpublished Opinion and Order of the United States District Court for the District of Montana, Missoula Division, dated August 17, 1992, is reprinted at page A-11.

JURISDICTION

The Ninth Circuit issued its original Memorandum opinion on April 19, 1994, and petitioners timely filed a petition for rehearing with suggestion for rehearing *en banc* on May 2, 1994. The Ninth Circuit issued its Order amending its April 19 Memorandum on September 7, 1994. The Court's Order denying rehearing was issued September 14, 1994. This Petition is filed within 90 days after September 14, 1994, and is timely under Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At issue in this case is whether the Seventh Amendment to the United States Constitution requires a more deferential standard of review than that applied by the Ninth Circuit in reviewing the denial of a post-verdict motion for judgment as a matter of law, under Rule 50 of the Federal Rules of Civil Procedure. The Seventh Amendment provides:

> In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 50 provides, in relevant part:

> **(a) Judgment as a Matter of Law.**
>
> (1) If during trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

* * *

> **(b) Renewal of Motion for Judgment after Trial; Alternative Motion for New Trial.** Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. . . . If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. . . .

This case also involves a due process and equal protection challenge to the Ninth Circuit's actions. The Fifth Amendment provides, in pertinent part, "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

This diversity case (28 U.S.C. § 1332) was tried to a jury, with the Honorable Charles C. Lovell presiding at trial. On March 23, 1992, the jury rendered a verdict for Martins, finding Respondent Norwest Bank Kalispell, N.A. ("the Bank") had committed acts of common law constructive fraud and misrepresentation in its dealings with Martins. The jury determined Martins' damages totalled $3,503,715.16. The jury further determined the Bank was not liable for punitive damages.

Following entry of judgment, the Bank timely filed a post-verdict motion for judgment as a matter of law under Rule 50. The Bank contended, *inter alia*, that the jury's verdict was not supported by the evidence.[1] Judge Lovell denied the motion. In doing so, he articulated and applied the following standard of review:

> . . . The Court will grant Defendant's motions "if the evidence construed in the light most favorable to the nonmoving party [Plaintiffs] permits only one reasonable conclusion as to the verdict and that conclusion is contrary to the jury's," and must deny Defendant's motions "if reasonable minds could differ over the verdict." *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 181 (9th Cir. 1989). The Court will not substitute its judgment regarding the credibility or weight of evidence for that of the jury.

A-12. Judge Lovell concluded the jury reasonably arrived at its verdict, based on the evidence presented at trial.

On appeal (pursuant to 28 U.S.C. § 1291), the Ninth Circuit articulated and applied a less deferential, substantial evidence standard of review:

> We review denial of a motion for judgment as a matter of law *de novo* to determine if the plaintiff's claims were supported by substantial evidence. *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir.), *cert. denied*, 113 S.Ct. 815 (1992). Our role is the same as the district court's.

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[1] The Bank also challenged the jury's damages determinations and the District Court's award of attorneys' fees to Martins in both its post-verdict motion and on appeal. The Ninth Circuit never reached those matters and they are not at issue in this Petition.

> *McGonigle v. Combs*, 968 F.2d 810, 816 (9th Cir.), *cert. dismissed*, 113 S.Ct. 399 (1992). A directed verdict is proper when the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party. *Erickson*, 960 F.2d at 804. The evidence must be viewed in the light most favorable to the nonmoving party and all reasonable inferences must be drawn in favor of that party. *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986).

A-4. The Ninth Circuit reversed in a short, not-for-publication memorandum, which it slightly modified following Martins' petition for rehearing. A-1. The Ninth Circuit concluded the jury's verdict was not supported by substantial evidence, and directed entry of judgment for the Bank.

The evidence, briefly summarized, established that the Bank for several years had financed a feed and grain business owned by Lee Tower and known as Kalispell Feed and Grain Montana (KFG). By 1980, it was apparent KFG could not meet its debt obligations to the Bank. The KFG debt was partially guaranteed by Farmers Home Administration (FmHA) and was secured by the KFG physical plant and equipment. KFG's inability to meet its debt obligations troubled the Bank, because the Bank was undersecured and considered the loan "bad." Throughout 1980, FmHA advised the Bank to prepare liquidation plans and that foreclosure was imminent. If the Bank had foreclosed at that time, it could have lost approximately $400,000 to $500,000.

In early 1981, Petitioner John Martin entered the picture and expressed an interest in acquiring KFG for

investment purposes only. A series of negotiations between and among Martin, Tower and the Bank ensued. These negotiations, and critical material the Bank withheld from Martin during negotiations, provided the basis for Martins' claims against the Bank.

Tower instructed the Bank to give Martin whatever information Martin needed. Tower then retreated to a "back seat" position in the negotiations; the Bank handled the transaction from that point forward. In April of 1981, after he had acquired what he had been led to believe was all the relevant information on the business within the Bank's knowledge, Martin agreed with the Bank to assume all of Tower's outstanding obligations. Martin also personally guaranteed the loans, and pledged significant collateral – his two personal homes – to secure the loans. With Martin and his collateral on the hook, the Bank was fully secured in the event of a failure of the business.

Two years after Martin's acquisition of KFG, the Bank pulled Martin's line of credit, knowing this would topple the business. Martin had injected nearly $700,000 cash trying to keep the business afloat before the Bank eventually foreclosed. The jury determined the Bank had failed to give Martin important information that led him to invest in the business and protect the Bank from loss through his guarantees and collateral. In denying the Bank's post-verdict motion for judgment as a matter of law, Judge Lovell noted that the verdict "demonstrates the jury's understanding of an important principle which [the Bank] apparently fails to understand – [the Bank] cannot profit from its wrongful acts by recovering debts which [Martins] were fraudulently induced to incur." A-16.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Approach In This Case and Other Recent Cases Does Not Sufficiently Protect Litigants' Seventh Amendment Rights, and it Conflicts with the Standard of Review Suggested by This Court's Authorities, and Applied by Other Circuits Under Rule 50.

It is settled that Rule 50(b) does not *per se* violate the Seventh Amendment right to a jury trial. *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 321 (1967). It is equally clear, however, that Seventh Amendment concerns significantly circumscribe and limit federal courts' authority to interfere with jury determinations. *See, e.g., Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59 (1962) ("[N]either we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.' "); *Lavender v. Kurn*, 327 U.S. 645, 653 (1946) ("[I]t would be an undue *invasion of the jury's historic function* for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury.") (emphasis added).

There is, however, confusion throughout the federal court system with respect to the proper standard and scope of review to be applied under Rule 50. This Court has, in a number of cases, articulated and applied a very deferential standard, which protects a jury's determination. In *Lavender*, for example, this Court stated:

> Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, *it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.*

327 U.S. at 653 (emphasis added). Similarly, in *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944), the reviewing court's role is defined:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. . . . It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Moreover, this Court has indicated the scope of the evidence to be considered in determining whether there is sufficient evidence for a jury is limited " . . . only to the evidence and reasonable inferences which tend to support the [non-moving party's case.]" *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949).

While some commentators and lower courts have suggested these standards apply only in cases under the Federal Employers Liability Act and Jones Act, this Court has indicated they represent the "federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship." *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 445 n. 8 (1959); *see also Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 n. 6 (1962) (citing *Tennant* as indicating the rule on appellate review of a jury verdict). *See generally* 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2526 (1971).

This Court has not recently visited this issue. In the absence of clear guidance, the lower courts have adopted a variety of approaches. Some are consistent with the principles articulated by this Court. For example, the Eighth Circuit recently articulated the applicable standard as follows:

> We review the grant of a motion for judgment as a matter of law under the same standard as that for a motion to direct the verdict. A motion for judgment as a matter of law should be granted " 'when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party.' " *Dace v. ACF Industries, Inc.*, 722 F.2d

> 374, 375 (8th Cir. 1983), *op. adhered to as supplemented by* 728 F.2d 976 (8th Cir. 1984) (quoting *Decker-Ruhl Ford Sales, Inc. v. Ford Motor Credit Co.*, 523 F.2d 833, 836 (8th Cir. 1975).

Ehrhardt v. Penn Mut. Life Ins. Co., 21 F.3d 266, 269 (CA8 1994). Thus, if there is any evidence upon which the jury's verdict reasonably could be based, the verdict is not to be upset. And, in reviewing the Rule 50 motion, "the court must assume that all of the evidence supporting the party opposing the motion is true, and . . . give that party the benefit of all reasonable inferences from that evidence. The case may be taken from the jury only if no rational jury could find against the moving party on the evidence so viewed." *Dace, supra*, 722 F.2d at 376 (relying on *Wilkerson v. McCarthy*). *See also, e.g., Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 351 (CA4 1994) (articulating and applying very deferential standard of review under Rule 50). *See generally* 1 S. CHILDRESS & M. DAVIS, FEDERAL STANDARDS OF REVIEW §§ 3.02, 3.03 (2nd ed. 1992); 9 WRIGHT & MILLER, *supra at* §§ 2524-2529 (1971).

In contrast, the Ninth Circuit, in this case and others, has applied the less deferential, "substantial evidence" standard, which examines the evidence as a whole and not just that supporting the verdict. A-4; *Erickson v. Pierce County*, 960 F.2d 801, 804 (CA9), *cert. denied*, 113 S.Ct. 815 (1992); *Coddington v. Wabash Life Ins. Co.*, 1994 U.S. App. LEXIS 1926 (CA9 Jan. 26, 1994), *cert. denied*, 63 U.S.L.W. 3262 (1994) (reversing Montana district court judgment entered on substantial jury verdict for plaintiff, on punitive damages, based on lack of substantial evidence under *Erickson* standard of review); *House of Stuart, Inc. v. Whirlpool Corp.*, 1994 U.S. App. LEXIS 22199 (CA9 Aug.

15, 1994) (reversing Montana district court judgment entered on substantial jury verdict for plaintiff, based on lack of substantial evidence under *Erickson* standard of review).[2] This standard, as articulated and applied, necessarily engages the Court in reweighing and reassessing the evidence and inferences that support and oppose the jury's verdict.

This Court has implicitly rejected the "substantial evidence" test of sufficiency. *See Lavender*, 327 U.S. at 743 (rejecting and reversing lower court's determination that there "was no substantial evidence" to support the submission of the case to the jury); *Tennant*, 321 U.S. at 410 (reversing court of appeals' determination of "no substantial proof").

Thus, the proper standard of review under Rule 50 remains unsettled. This is a matter of significant, practical importance, with constitutional implications; it is not a matter of mere semantics or academic interest. *See Schwimmer v. Sony Corporation*, 459 U.S. 1007, 1009 (1982) (Opinion of White, J., respecting denial of certiorari) ("Because the scope of review will often be influential, if not dispositive, of a motion for judgment n.o.v., this disagreement among the Federal Courts of Appeal is of far more than academic interest."). *See also* WRIGHT & MILLER, *supra*, § 2525, at 556 ("It is extremely important to know whether the [FELA] decisions are confined to the

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[2] Neither Martins nor the Bank relied upon *Erickson's* substantial evidence test in their briefs to the Ninth Circuit. Both parties correctly articulated a more deferential standard of review. *See* Brief of Appellant, dated Sept. 1, 1993, at pp. 20-21; Brief of Appellees, dated Oct. 20, 1993, at pp. 19-20.

particular statutory actions in which they have been handed down, or whether they represent a construction of the Seventh Amendment, and thus are controlling in all jury cases in federal courts.").

If review is granted in this case, Martins will demonstrate on full briefing that by its approach the Ninth Circuit improperly weighed and reconsidered evidence, and ignored evidence and reasonable inferences supporting the jury's verdict.[3] For example, the Court of Appeals determined Martins failed to prove the Bank had "created a false impression, or by its words or conduct misled [Martins]," so the evidence was "insufficient to support [the] constructive fraud claim." A-1, A-2. In arriving at this factual determination, the Court necessarily ignored or rejected evidence, and reasonable inferences therefrom, that established for the jury that the Bank created a false impression about the prospects for FmHA financing and the financial viability of the business Martins acquired. In doing so, the Ninth Circuit exceeded its

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[3] The Court of Appeals also ignored the district court's conclusion that the jury's verdict was supported by the evidence and inferences. *Cf. Dick, supra,* 359 U.S. at 447 ("After all the evidence was in, the district judge, who was intimately concerned with the trial and who has a first-hand knowledge of the applicable state principles, believed that the case should go to the jury. Under all the circumstances, we believe that he was correct and that reasonable men could conclude [as they did]."); *Brinkley-Obu, supra,* 36 F.3d at 351 (noting, in articulating standard of review, that "[b]oth the jury and the district court concluded there was sufficient evidence to support a verdict in the plaintiff's favor.").

proper role, and infringed on Martins' Seventh Amendment rights – as a direct result of its misapplication of the proper standard of review under Rule 50.

The Ninth Circuit, and other lower courts, have adopted and applied standards for reviewing motions for judgment as a matter of law that conflict with this Court's authorities and the protection guaranteed under the Seventh Amendment. The confusion and conflicting approaches in the lower courts is pervasive. The Court should grant certiorari to review and clarify the law in this important area.

II. The Questions Presented Are Important.

A. The Proper Relationship Between Rule 50 and the Seventh Amendment is a Recurring, Vitally Important Issue to Litigants throughout the Federal Court System.

In virtually all cases tried to a jury, defense counsel move for judgment as a matter of law at some point in the trial. In many cases, that motion is renewed after an unfavorable (plaintiff's) verdict. Thus, the proper standard of review for such motions is a matter of widespread and significant application. This Court has not addressed this issue in recent years, and its earlier authorities have resulted in confusion and disagreement in the lower courts. Given the important constitutional issue at stake, guidance and instruction from this Court is needed.

This issue has become particularly acute in recent months for Montana litigants. In addition to the present

case, the Ninth Circuit has reversed, on substantial evidence grounds, two other cases in which juries have rendered plaintiffs' verdicts in cases involving commercial torts. *See House of Stuart* and *Coddington, supra.* In each case, the Court of Appeals has engaged in a searching reexamination and reweighing of evidence, to reverse the findings of the juries (each of which had survived post-verdict motions for judgment as a matter of law).

This case provides an important opportunity for this Court to clarify the correct relationship between the Seventh Amendment and Rule 50.

B. This Court Should Exercise its Supervisory Powers to Provide Guidance Regarding the Courts of Appeals' Pervasive Use of Unpublished, No-Citation Opinions When Reversing Judgments from the District Courts.

As discussed elsewhere in this Petition, the Ninth Circuit's decision was wrong. Significantly, that decision resulted from a flawed and unfair appellate process: adjudication through an unpublished/no-citation memorandum decision. By its nature, this process involves less rigorous appellate review than that which goes into a published decision.

Unpublished/no-citation opinions legitimately and necessarily have a place in our busy federal judicial system. Because of the important federal constitutional right to a trial by jury, however, they should not be permitted in cases, like this, where the appellate court reverses a judgment entered on a jury's verdict.

This Court has recognized it is vitally important that our judicial system operate in the open. *See, e.g., Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980); *Nixon v. Warner Communications,* 435 U.S. 589 (1978). As the Seventh Circuit recently noted, in construing this Court's authorities on the public's access to court proceedings, "Public scrutiny over the court system serves to (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding." *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.,* 24 F.3d 893, 897 (CA7 Cir. 1994).

Correspondingly, in our appellate system, the court's opinion serves "three critical purposes. First, litigants and the public are assured the decision is the product of reasoned judgment and thoughtful evaluation rather than the mere exercise of whim and caprice. Second, the very writing of an opinion reinforces the decisionmaking and ensures correctness. Third, appellate opinions are the lifestream of the common law, for they create precedents." T. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS, 119-120 (1994).

Thus, Justice Brennan's words about the importance of open trials apply as well to the importance of an open and fair appellate system:

> [I]t is a means of meeting "the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.' " . . . For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are

> governed equitably. That necessity underlies constitutional provisions as diverse as the rule against takings without just compensation . . . and the Equal Protection Clause. It also mandates a system of justice that demonstrates the fairness of the law to our citizens. . . .
>
> Secrecy is profoundly inimical to this demonstrative purpose of the [judicial] process.

Richmond Newspapers, Inc., supra, 448 U.S. at 594-95 (Brennan, J., concurring) (citations omitted).

In recent years, the courts of appeals have increasingly rendered their decisions in the form of unpublished/no-citation opinions, pursuant to non-uniform circuit rules.[4] *See* RATIONING JUSTICE ON APPEAL, *supra* at pp. 125-35; MANAGING APPEALS IN FEDERAL COURTS, pp. 455-534 (FED. JUD. CENTER 1988); ANNUAL REPORTS OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS. This trend undermines the openness, fairness and integrity of the judicial process. It has created a "two-tracked system," RATIONING JUSTICE ON APPEAL, *supra* at 130, which can result in the "denial of equal justice." James N. Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A. J. 1224 (Oct. 1975).

It is commonly acknowledged, by judges as well as commentators, that writing an opinion for publication requires greater care and attention, and results in better

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[4] Each Circuit has adopted a rule regarding publication and citation of opinions. *See* 1ST CIR. R. 36.2; 2ND CIR. R. 0.23; 3RD CIR. R. 5.5 - 5.6; 4TH CIR. R. 36.4 - 36.6; 5TH CIR. R. 47.5; 6TH CIR. R. 10(F) and R. 22; 7TH CIR. R. 53; 8TH CIR. R. 47B and R. 28A(K); 9TH CIR. R. 36-2 - 36-3; 10TH CIR. R. 36; 11TH CIR. R. 36-1 and 36-2; D.C. CIR. R. 11(C) and 14; FED. CIR. R. 47.8.

decisionmaking. Judge Reinhardt, of the Ninth Circuit, candidly spoke to the pernicious effects of the increasing trend toward unpublished memorandum dispositions:

> Those who believe we are doing the same quality work that we did in the past are simply fooling themselves. We adopt more and more procedures for "expediting" cases, procedures that ensure that individual cases will get less attention. . . . [W]e now all too often give cases second-class treatment. We merely look at the files and then issue unpublished memorandum dispositions or orders.
>
> The use of these makeshift procedures ensures that many cases do not get the full attention they deserve, and the quality of our work suffers.

Stephen Reinhardt, *A Plea to Save the Federal Courts – Too Few Judges, Too Many Cases*, 79 A.B.A. J. 52 (Jan. 1993). Judge Wald, of the D.C. Circuit, has noted that the unpublished opinion process "has an obvious bearing on judicial accountability. Although unpublished opinions may indeed save time, they limit the public's ability to evaluate the correctness of judicial actions and give rise to uncertainties about the integrity of the courts." Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?*, 42 Md. L. Rev. 766, 783 n. 41 (1983). Further, she cautioned that appellate judges "must take care . . . that their reactions to a stepped-up work load do not corrode the essence of their judicial functions – reading and listening to the arguments of the parties, being familiar with the record, making and explaining their decisions *generally for publication*. Taking shortcuts in any of these areas is a danger signal

for the process. . . . " *Id.* at 785-86 (emphasis added). In dissenting from the adoption of the Tenth Circuit's no publication/no citation rules, Judge Holloway recently cautioned:

> [T]he basic purpose for stating reasons within an opinion or order must never be forgotten – that the decision must be able to withstand the scrutiny of analysis . . . as to its soundness . . . and as to its consistency with our precedents. Our orders and judgments, like our published opinions, should never be shielded from searching examination.

In Re Rules of the United States Court of Appeals for the Tenth Circuit, 955 F.2d 36, 38 (CA10 1992) (Holloway, J., dissenting).

The increasing use of unpublished opinions has also been the subject of extensive study and commentary, which has "largely been negative." Baker, *supra* at 130. Professor Baker's 1994 report for the Justice Research Institute notes, for example, "In a profession that judges itself by the appearance of impropriety, limited publication appears at odds with accepted appellate tradition. Suspicions and accusations that judges are being less than diligent or are giving some appeals less than their due spring to mind, if not to reality." *Id.* In 1988, the Federal Judicial Center republished a comprehensive study by Professors Reynolds and Richman, in which they conclude:

> The discipline of providing written reasons . . . often will show weaknesses or inconsistencies in the intended decision that may compel a change in the rationale or even in the ultimate

> result. * * * Far and away the major problem we have identified in connection with limited publication is that created by opinions that do not satisfy minimum standards. Such opinions do not give the appearance that justice has been done. More important, perhaps, shoddy opinions may reflect the quality of thought that went into the decision itself.

MANAGING APPEALS IN FEDERAL COURTS, *supra* at 470, 485 (republishing William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981)).

The parties below actively litigated this case for approximately three years before trial. They went through extensive discovery and pretrial proceedings. They prepared for and tried the case to a jury over six days of trial. On March 23, 1992, the jury rendered its verdict for Martins, and determined their damages totalled in excess of $3 million. Extensive post-trial motions were filed, briefed and argued. The district court judge who had presided throughout pretrial and trial proceedings considered those motions and rendered written decisions.

On appeal, the issues were thoroughly briefed. The parties' attorneys travelled several hundred miles and presented their arguments to a panel of the Ninth Circuit on March 11, 1994.

After all this, the Ninth Circuit issued its cursory, unpublished memorandum, reversing the judgment below. A-3. In doing so, the Court of Appeals rejected the

considered judgment of Judge Lovell and the factual determinations of the jury.

Petitioners, in seeking rehearing, pointed out that the memorandum disposition misapplied controlling law on constructive fraud, in conflict with a published opinion of the Ninth Circuit. Further, the Court had ignored and misconstrued important evidence. Recognizing it had erred, the Court of Appeals modified its memorandum by adding new, unfounded factual determinations, but ignoring the misstated (and conflicting) legal principles. A-1.

Martins' federal constitutional right to a jury trial is adversely affected by the Court of Appeals' decision. With this important constitutional right at stake, they are entitled to due process and equal protection under the Fifth Amendment. *Cf. Evitts v. Lucey*, 469 U.S. 387, *rehearing denied*, 470 U.S. 1065 (1985) (even though states may not be required to create an appellate system, any appellate system that is created must comply with principles of due process); *Griffin v. Illinois*, 351 U.S. 12, *rehearing denied*, 351 U.S. 958 (1956) (state had to provide transcripts to criminal defendants who could not afford to pay for them, in order to protect a sufficient level of equal justice).

The Ninth Circuit's publication rules (CIRCUIT RULES 36-1 - 36-6), on their face and as applied, do not require that written, published opinions be rendered where the court reverses a judgment entered on a jury verdict. In such cases, a full published opinion should be required. *See* FEDERAL JUDICIAL CENTER, *supra at* 490-91 (proposing a Model Rule for publication criteria, including cases in

which the court of appeals reverses the judgment below, except in limited circumstances). By arbitrarily classifying this case as unworthy of the more rigorous published opinion process, the Court of Appeals has deprived Martins of due process and equal protection under the Fifth Amendment.

Even if the Court were not to agree that the unpublished opinion process implicates constitutional issues, the matter is certainly of sufficient importance to warrant the Court exercising its power of supervision under Rule 10.1(a). *Cf. Thermtron Products v. Hermansdorfer,* 423 U.S. 336 (1976) (construing power of federal district court to deny removal from a state court because the district court's docket was too heavy). The unpublished opinion criteria and practices in the courts of appeals vary widely across and within circuits. This "patchwork system is unsatisfactory and it has been tolerated too long. Standards are necessary." *Baker, supra at* 133.

This case is particularly appropriate for an examination of these important issues. The Ninth Circuit's decisionmaking process and result demonstrate the problems with unpublished opinions.[5] It conceded error in its initial memorandum by subsequently issuing an order modifying the

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[5] Given the constitutional and serious financial interests at stake, and all that went into preparing for trial and appeal, Martins reasonably believe they received the "second-class treatment" about which Judge Reinhardt candidly wrote. S. Reinhardt, *A Plea to Save the Federal Courts, supra,* p. 52. Moreover, the Ninth Circuit has recently used the same unpublished/no-citation process to take away, on substantial evidence grounds, substantial jury verdicts from Montana in *House of Stuart, supra* and *Coddington, supra.* These opinions

memorandum. The modification compounded the Court's error by ignoring pertinent law and facts. If the Court of Appeals were required to undertake the more rigorous and effective process of preparing a published opinion, the result would change.

Additionally, the procedural history (jury verdict affirmed by district court and reversed on appeal) provides an appropriately narrow context within which to examine and articulate standards for when publication is required – as a matter of constitutional right and/or to protect and preserve the integrity of the judicial process. For these reasons, this Court should grant Martins' petition for certiorari.

III. The Decision of the Court of Appeals is Erroneous.

Martins pointed out in their petition for rehearing that the Court of Appeals erred in its articulation of the substantive law governing constructive fraud. In particular, the Court incorrectly stated, "Constructive fraud, like negligent misrepresentation, requires a factual showing that the claimed representations were false." A-9-A-10. This proposition contradicted the stipulated jury instructions, as well as a prior opinion of the Ninth Circuit, *In Re Mediscan Research, Ltd.*, 940 F.2d 558 (CA9 1991). In truth, concealed facts that may create a false impression are sufficient to form a basis for constructive fraud.

This legal error was particularly important. In reweighing the evidence upon which the jury had based

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certainly do not "give the appearance that justice has been done." MANAGING APPEALS IN FEDERAL COURTS, *supra* at 485.

its verdict, the Ninth Circuit emphasized throughout its original opinion that, based on its own review of the evidence, Martins had failed to prove the Bank had made false statements of fact. The Ninth Circuit obviously did not consider whether the jury reasonably could have concluded Martins had been given a false impression or otherwise misled by the Bank.

Martins further pointed out that the Court of Appeals erred in its standard of review by improperly ignoring evidence and reasonable inferences supporting the jury's verdict, and independently judging the credibility of witnesses and the weight of the evidence. Taken together, the Court of Appeals' mistakes of law and fact led it to a wrong decision.

The Court of Appeals acknowledged it had erred by issuing its September 7, 1994 Order, modifying its memorandum disposition. A-1. In doing so, however, it only compounded its errors.

The Ninth Circuit's decision cannot be reconciled with the record, as Martins will demonstrate upon full briefing. Moreover, the court below violated principles governing the correct standard of review under Rule 50. Further, its decisionmaking process was constitutionally infirm or, at the very least, so far departed from acceptable standards of appellate judicial proceedings that this Court should exercise its supervisory powers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 13th day of December, 1994,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona corporation; KALISPELL FEED AND GRAIN, INC., an Arizona corporation; JOHN W. MARTIN, individually; PATRICIA M. MARTIN, individually, Plaintiffs-Appellees, v. NORWEST BANK KALISPELL, N.A., A national banking corporation, et al., Defendant-Appellant.	No. 92-36713 D.C. No. CV-85-147-M-CCL ORDER (Filed Sept. 7, 1994)

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted March 11, 1994
Seattle, Washington

Before: HUG, HALL, and THOMPSON, Circuit Judges.

The memorandum disposition filed April 19, 1994, shall be amended by replacing the last full paragraph on page 8 with the following:

> Because Martin failed to prove that Norwest made false representations, created a false impression, or by its words or conduct misled

Martin, the evidence was insufficient to support his constructive fraud claim, and Norwest's motion should have been granted.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona corporation; KALISPELL FEED AND GRAIN, INC., an Arizona corporation; JOHN W. MARTIN, individually; PATRICIA M. MARTIN, individually, Plaintiffs-Appellees, v. NORWEST BANK KALISPELL, N.A., A national banking corporation, et al., Defendant-Appellant.	No. 92-36713 D.C. No. CV-85-147-M-CCL MEMORANDUM* (Filed Apr. 19, 1994)

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted March 11, 1994
Seattle, Washington

Before: HUG, HALL, and THOMPSON, Circuit Judges.

John W. Martin Construction Company, Inc., Kalispell Feed and Grain, Inc. of Arizona, and John and

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Patricia Martin (collectively "Martin") brought this misrepresentation and fraud action against Norwest Bank Kalispell, NA ("Norwest") after Norwest cut off Martin's line of credit for Kalispell Feed & Grain Supply, Inc. ("KF&G"). The issues are whether the district court erred by denying Norwest's motion for judgment as a matter of law on Martin's negligent misrepresentation and constructive fraud claims and on the compensatory damages and emotional distress awards, and by awarding attorney's fees to Martin. The district court's jurisdiction was based upon 28 U.S.C. § 1332. We have jurisdiction to review pursuant to 28 U.S.C. § 1291, and we reverse.

I.

We review denial of a motion for judgment as a matter of law *de novo* to determine if the plaintiff's claims were supported by substantial evidence. *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir.), *cert. denied*, 113 S. Ct. 815 (1992). Our role is the same as the district court's. *McGonigle v. Combs*, 968 F.2d 810, 816 (9th Cir.), *cert. dismissed*, 113 S. Ct. 399 (1992). A directed verdict is proper when the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party. *Erickson*, 960 F.2d at 804. The evidence must be viewed in the light most favorable to the nonmoving party and all reasonable inferences must be drawn in favor of that party. *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986).

We conclude that the evidence is insufficient to support the finding of negligent misrepresentation. Therefore, the district court erred by denying Norwest's

motion for judgment as a matter of law on Martin's negligent misrepresentation claim.

Martin was required to prove that:

a) the defendant made a representation as to a *past* or *existing* material fact;

b) the representation was untrue;

c) the defendant made the representation without any reasonable ground for believing it to be true;

d) the representation was made with the intent to induce the plaintiff to rely on it;

e) Martin was unaware of the falsity of the representation and must have acted in justifiable reliance on it;

f) as a result of that reliance, Martin sustained damage.

Kitchen Krafters, Inc. v. Eastside Bank of Montana, 789 P.2d 567, 573 (Mont. 1990).

At trial, Martin argued that Norwest misrepresented the prospects of KF&G obtaining FmHA-guaranteed financing, the value of KF&G, KF&G's financial needs, and KF&G's potential. We have examined the evidence supporting each of these theories in the light most favorable to Martin, and find it insufficient.

1. Denial of FmHA Application

At trial, Martin sought to establish that Norwest had deliberately not told Martin that the FmHA loan application had been denied, and that further applications

would be denied as well, because Norwest wanted to induce Martin to inject equity into KF&G and to pledge his homes as collateral.

Prior to FmHA's final denial on February 27, 1981, Norwest clearly stated that it would "continue to pursue the present request for a $810,000 FmHA guaranty loan," but that "it would have to be understood that the proposal as it now exists would have to be amended."

Martin testified at trial that prior to entering into the purchase and sale agreement, he knew that the FmHA application by KF&G had been turned down [in December]. White and former owner Tower testified that KF&G was sold to Martin only because the application had been rejected. Martin's testimony also showed that he understood that a new FmHA application would have to be made. Thus, even if Norwest did not tell Martin that KF&G's earlier FmHA application made by Tower had been rejected for the second time, Martin clearly had been told that the application had been rejected initially by White before Martin purchased the company.

Martin does not point to evidence showing that Norwest knew that future applications would be denied. In fact, FmHA's letters suggested that an application would be granted if capital were infused from another source. To the extent that Norwest stated that the loan application would be pursued, and, with Martin's financial statement, should be approved, Norwest did not represent any *past* or *existing* fact. *Kitchen Krafters*, 789 P.2d at 573.

2. Replacement Cost Appraisal

Martin relies upon evidence that a bank representative handed him a copy of the 1980 FmHA loan application and stated, "Here's what you're buying." The loan application contained an appraisal showing a replacement cost value of $2,218,400. Construing the evidence in the light most favorable to Martin, Olson's statement and Norwest's signature on the application are arguably enough to attribute the representation to Norwest. However, Olson's statement is not evidence that Norwest represented the appraisal as something other than a replacement cost appraisal. The appraisal clearly stated that it was based upon replacement cost.

Martin was required to show that a representation of Norwest was false. *See Batten v. Watts Cycle and Marine, Inc.*, 783 P.2d 378, 381 (Mont. 1989), *cert denied*, 494 U.S. 1087 (1990). At trial, Martin presented correspondence between Norwest and FmHA that had not been given to Martin in which both expressed concern that a forced sale, in light of the then-extremely high interest rates, would result in a loss as the property would sell at "less than the true value of the assets" – approximately $1.5 to $1.6 million. This evidence does not indicate that the replacement cost appraisal was incorrect or that Norwest falsely represented the value of the company as a going concern. There is no evidence that Norwest made any representation of the liquidation value of the company.

3. Statements Regarding KF&G's Need for Funding

Martin argued at trial that Norwest had falsely told him that KF&G needed only $500,000, when, in fact, FmHA had estimated that a minimum of $1 million was necessary to finance the operation. FmHA again informed Norwest by telephone on February 5, 1981, that at least $1 million was needed, $500,000 of which must be in the form of equity. On February 6, 1981, Norwest stated in its Letter of Intent that it had requested the injection of $500,000 in equity because FmHA thought that it was necessary in order for FmHA to entertain a request for an additional $500,000.

These facts do not show that Norwest misrepresented KF&G's needs. KF&G asked for $810,000 in July 1980. FmHA found that this would not be enough for KF&G, "especially if significant increases in sales [were] projected." FmHA concluded that KF&G needed at least $1 million in working capital. "To have a reasonable chance of approval [of the FmHA guaranty application], at least $1 million is needed, $500,000 of which must be in the form of equity." That is, FmHA informed Norwest that KF&G needed an equity injection of $500,000 and a loan of at least $500,000 to have enough working capital. The clear meaning of FmHA's letter was that an application for $500,000 would have "a reasonable chance of approval" if $500,000 were injected independently. Norwest's Letter of Intent stated this rather clearly. Martin did not prove that there was any misrepresentation about KF&G's funding needs, on which Martin could have relied.

4. Viability

In its Letter of Intent, Norwest stated that "under proper conditions," KF&G was "a viable company that could show a profit." This statement was clearly conditional, and does not represent a past or existing material fact, which is the first element of negligent misrepresentation. *See Kitchen Krafters,* 789 P.2d at 573.

Martin also failed to prove that he relied on this statement. Martin's testimony makes clear that he understood the conditional nature of the statement, and, thus, that he did not rely on the statement. He testified that he understood the letter to mean that having a line of operating credit would be the proper condition referred to by Norwest, and would be necessary for KF&G to make a profit.

II.

Norwest also moved for judgment as a matter of law on Martin's constructive fraud claim, but the district court denied the motion.

"Constructive fraud occurs when a party to a transaction conceals from the other party material facts about the nature of the transaction." *Mends v. Dykstra,* 637 P.2d 502, 506 (Mont. 1981) (internal quotation omitted). It consists of a breach of duty that gains an advantage to the person in fault by misleading another to his prejudice, or of any act or omission that the law specially declares to be fraudulent. *Id.* at 505-6; *Bottrell v. American Bank,* 773 P.2d 694, 706 (Mont. 1989). Constructive fraud, like negligent misrepresentation, requires a factual showing that the

claimed representations were false. *Batten*, 783 P.2d at 382. Both torts also require that the plaintiff did not know the truth regarding the matters allegedly misrepresented. *Id.* at 381.

Because Martin failed to prove that Norwest made false representations, the evidence was insufficient to support his constructive fraud claim, and Norwest's motion should have been granted.

III.

Because we conclude that the evidence does not support the jury's verdict of liability, the compensatory damages and emotional distress awards must be vacated.

IV.

The district court awarded $421,307.26 to Martin for attorneys' fees and expenses. Because we hold that Norwest is not liable for negligent misrepresentation or constructive fraud, Martin is not the prevailing party on any claim and is not entitled to fees under any theory.

V.

The judgment of the district court is **REVERSED** and the case is **REMANDED** for entry of judgment for the defendant consistent with our opinion.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

* * *

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona corporation, KALISPELL FEED AND GRAIN, INC., an Arizona corporation, JOHN W. MARTIN, individually, and PATRICIA M. MARTIN, individually,

Plaintiffs,

-v-

NORWEST BANK KALISPELL, N.A., a national banking corporation,

Defendant.

and

NORWEST BANK OF KALISPELL, N.A., a national banking association,

Counterclaimant,

-v-

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona corporation, JOHN W. MARTIN, individually, and PATRICIA M. MARTIN, individually,

Counterclaim Defendants.

CV 85-147-M-CCL

OPINION AND ORDER

(Filed Aug. 17, 1992)

* * *

Defendant Norwest Bank Kalispell renews its motion for judgment as a matter of law, originally made at the close of the evidence in this case, on the grounds that there is no legally sufficient evidentiary basis for a reasonable jury to have found in favor of Plaintiffs on Plaintiffs' claims. Defendant also contends that there is no legally sufficient evidentiary basis for a reasonable jury to have found the damages which the jury awarded. Defendant also asks the court to alter or amend its award of attorneys' fees, on the grounds that there is no legal or evidentiary basis for such an award. Plaintiffs oppose Defendant's motions. Having considered the arguments of the parties and its recollection of the record of this trial, the court is now prepared to rule.

A. Standard of Review.

Defendant's motion for judgment as a matter of law is governed by Fed. R. Civ. P. 50, which was amended in December of 1991. The parties agree that the court should decide this motion according to the standards for judgment notwithstanding the verdict articulated by existing case law under Rule 50 as it existed prior to its amendment. The court will grant Defendant's motions "if the evidence construed in the light most favorable to the nonmoving party [Plaintiffs] permits only one reasonable conclusion as to the verdict and that conclusion is contrary to the jury's," and must deny Defendant's motions "if reasonable minds could differ over the verdict." *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 181 (9th Cir. 1989). The court will not substitute its judgment regarding the credibility or weight of evidence for that of the jury.

B. Negligent Misrepresentation and Constructive Fraud.

Defendant argues that the contentions identified by Plaintiffs as the bases for their claims of misrepresentation and constructive fraud either provide no basis for those claims as a matter of law, or are not supported by substantial evidence of record. Plaintiffs respond that the evidence, when viewed in its entirety, supports the jury's verdict.

Defendant raised many of these same arguments in its motion for summary judgment as to Plaintiffs' negligent misrepresentation and constructive fraud claims. In denying Defendant's motion for summary judgment, the court noted that Plaintiffs raised a disputed issue of material fact as to whether Defendant made statements which created a false impression concerning the viability of Kalispell Feed and Grain Supply, Inc. (KFG), which gave rise to a duty to disclose material factual information to Plaintiffs. The court also noted that Plaintiffs raised a factual issue as to whether Norwest misrepresented KFG's value by allegedly endorsing an appraisal which overstated KFG's value. May 28, 1991, opinion and order at p. 12.

1. Constructive Fraud.

When viewed in the light most favorable to Plaintiffs, the evidence at trial supported Plaintiffs' contentions of constructive fraud. The evidence demonstrated that Defendant participated in the negotiations which led to Plaintiffs' purchase of KFG. Defendant represented that KFG was a viable business and provided an application

for an FmHA guaranty which included an appraisal showing KFG to have substantial equity. Defendant represented that it would pursue the guaranty from the FmHA.

Defendant, which was authorized to provide Plaintiffs with all the financial information about KFG which was in Defendant's possession, did not inform Plaintiffs of a number of material facts, including the following: 1) the FmHA had refused the guaranty application and turned down the appeal request; 2) the FmHA had indicated that it would not consider guaranteeing the requested $810,000 loan unless a large amount of equity was injected into KFG; 3) certain FmHA officials believed that KFG should be liquidated; and 4) FmHA officials believed that KFG's liquidation value was not sufficient to cover KFG's debts.

The failure to disclose material facts does not, by itself, rise to the level of actionable fraud. However, "a pattern of repeated concealments of the true state of affairs concerning the condition of a [business] and probable business earnings" may result in a finding of constructive fraud. *Moschelle v. Hulse*, 190 Mont. 532, 622 P.2d 155, 159 (1980). It was reasonable for the jury to decide, based on this evidence presented at trial, that Defendant had a duty to disclose the facts necessary to "erase the false impressions" it had created in Plaintiff's mind. *Id.* The jury's finding that Defendant committed an act of constructive fraud by concealing the facts necessary to provide Plaintiffs with a complete and accurate picture of KFG's viability is supported by substantial evidence.

2. Negligent Misrepresentation.

Defendant argues that any misrepresentations about the value and the viability of KFG which it made cannot support a finding of negligent misrepresentation because Defendant was expressing an opinion and not stating a representation of material fact. Defendant cites *Dolson Co. v. Imperial Cattle Co.*, 624 P.2d 993 (Mont. 1981) to support its contention that the court should determine as a matter of law that statements about KFG's value constitute opinions rather than factual representations. While it is true that the district court made that determination in *Dolson*, the court was acting as a finder of fact at the time. The Montana Supreme Court affirmed the district court's decision, noting that the finder of fact is in the best position to "assess the credibility of witnesses, and conclude whether the statements regarding value constitute fact or opinion." *Id.* at 996.

In this case the jury was the finder of fact. The jury found that Defendant made negligent misrepresentations of fact to Plaintiffs. That determination is supported by substantial evidence, and will not be set aside.

C. Damages.

Defendant contends that it is entitled to judgment as a matter of law with respect to that portion of damages which was awarded to offset the debt owed by Plaintiffs to Defendant because there is no factual or legal basis for such an award. The jury was instructed, with the consent of all parties, that it should award damages for any injuries caused by Defendant's negligent misrepresentation and constructive fraud. In his closing argument,

Plaintiff's counsel argued that Defendant's acts of constructive fraud and negligent misrepresentation caused Plaintiffs to purchase KFG and incur the debts in question. Defense counsel did not object to this argument, and deliberately chose not to argue damages during his own closing.

The jury verdict demonstrates the jury's finding that Plaintiffs would not have incurred the debt in question but for Defendant's negligent misrepresentation and constructive fraud. That finding is supported by substantial evidence. The verdict also demonstrates the jury's understanding of an important principle which Defendant apparently fails to understand – Defendant cannot profit from its wrongful acts by recovering debts which Plaintiffs were fraudulently induced to incur.*

Defendant also argues that it is entitled to judgment as a matter of law as to Mr. Martin's award of damages in the amount of $250,000 for emotional distress. The court carefully considered this issue prior to instructing the jury as to emotional distress damages, recognizing its "duty to determine the threshold question of whether any proof of such severe emotional distress exists sufficient to

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* Defendant's counsel acknowledged during the jury instruction conference that a verdict in favor of any plaintiff as to the constructive fraud claim would prevent Defendant from pursuing its debt claim against said plaintiff. The court attempted in its instructions to clarify this point for the jury by informing the jury of the amount that Defendant would recover if Defendant prevailed in its debt claim. Defendant raised no objection to this portion of the instructions and failed to object to Plaintiffs' damage calculations during Plaintiffs' closing argument.

raise a question of fact for the jury." *First Bank (N.A.) v. Clark*, 236 Mont. 195, 771 P.2d 84, 91 (1989). There was sufficient evidence in the record to satisfy the threshold inquiry and to support the jury verdict.

D. Attorneys' Fees.

Defendant asks the court to alter or amend its award of attorneys' fees to Plaintiffs on the grounds that Plaintiffs failed to establish the legal and evidentiary basis for such an award. Rather than raising any new argument on this issue, Defendant summarizes its prior argument and incorporates its prior brief. The court carefully considered Defendant's argument prior to granting Plaintiffs' motion for attorneys' fees. The reasons given for that award in the court's May 29, 1992, opinion and order remain valid, and Defendant's motion to alter or amend is without merit.

In accordance with the forgoing,

IT IS HEREBY ORDERED that Defendant's motions for judgment as a matter of law and to alter or amend the judgment are DENIED.

The clerk is directed forthwith to notify counsel of entry of this order.

Done and dated this 17 day of August, 1992.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States
District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona corporation; KALISPELL FEED AND GRAIN, INC., an Arizona corporation; JOHN W. MARTIN, individually; PATRICIA M. MARTIN, individually, Plaintiffs-Appellees, v. NORWEST BANK KALISPELL, N.A., A national banking corporation, et al., Defendant-Appellant.	No. 92-36713 D.C. No. CV-85-147-M-CCL ORDER (Filed Sept. 14, 1994)

Appeal from the United States District Court
for the District of Montana

Before: HUG, HALL, and THOMPSON, Circuit Judges.

The panel, as constituted in the above case, has voted to deny appellees' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a

vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b)

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED.**